IN THE IOWA DISTRICT COURT FOR POLK COUNTY

LS POWER MIDCONTINENT, LLC; and SOUTHWEST TRANSMISSION, LLC, Plaintiffs, vs. STATE OF IOWA; IOWA UTILITIES BOARD; GERI D. HUSER; GLEN DICKINSON; and LESLIE HICKEY, Defendants, MIDAMERICAN ENERGY COMPANY and ITC MIDWEST LLC, Intervenors.	Case No. CVCV060840 **DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO RECONSIDER**

Defendants hereby respond to Plaintiffs' Motion for Reconsideration, Enlargement or Modification. Even if the Court expands its ruling, the underlying conclusion—that Plaintiffs lack standing and therefore this lawsuit cannot proceed—should not change, for several reasons. Further, the Court should not waive standing under the great-public-importance exception. Defendants state as follows:

1. Plaintiffs filed a petition for declaratory and injunctive relief on October 14, 2020.

2. Plaintiffs' lawsuit challenges Division XXXIII of House File (HF) 2643, which was passed in the 2020 session of the Iowa General Assembly. *See* 2020 Iowa Acts, ch. 1121, § 128.

3. Plaintiffs challenge only Division XXXIII, and no other part of HF 2643.

4. Division XXXIII of HF 2643 establishes a right of first refusal (ROFR) applicable to electric transmission projects in Iowa, and it is now codified at Iowa Code section 478.16.

5. On March 25, 2021, the Court granted Defendants' Motion to Dismiss, finding Plaintiffs lack standing because their claimed injuries are speculative and anticipatory.

6. Plaintiffs now ask the Court both to reconsider its ruling (to reach a different conclusion) and to expand its ruling (to consider new or additional information, include more analysis, or both).

7. A motion to reconsider under rule 1.904 is procedurally the "proper means by which to preserve error and request a ruling." *Homan v. Branstad*, 887 N.W.2d 153, 161 (Iowa 2016). Whether the Court expands its analysis to address additional issues or not, however, the underlying substantive conclusion should not change.

8. Although Plaintiffs' motion is procedurally appropriate, some of its substantive requests are not. For example, Plaintiffs assert in part that "an April 9, 2021 presentation" identified specific projects that now demonstrate Plaintiffs' standing. (Mtn. to Reconsider Br. at 13.) Of course, that April 9 presentation occurred *after* the Court's ruling on March 25. Therefore, the Court cannot consider it; after all, the Court is deciding a motion to *re*consider, not a motion to consider for the first time. *See McKee v. Isle of Capri Casinos, Inc.*, 864 N.W.2d 518, 525 (Iowa 2015) ("Generally speaking, a party cannot use a rule 1.904(2) motion to introduce new evidence."); *In re Marriage of Bolick*, 539 N.W.2d 357, 361 (Iowa 1995) ("Motions [to reconsider] are permitted so that courts may enlarge or modify findings based on evidence *already in* the record. They are not vehicles for parties to retry issues based on new facts." (emphasis added)).

9. Alternatively, even if Plaintiffs' reliance on data or graphics from an April 9 presentation is merely duplicative of evidence the Court already had before it, the presentation does not have the effect Plaintiffs suggest. A map illustrating areas of congestion or potential need does not indicate a project is imminent, announced, or underway. Designing or proposing a

hypothetical project, like the "specific transmission solution" between northwest Iowa and Council Bluffs Plaintiffs rely on (Mtn. to Reconsider Br. at 12–13), does not mean the project will actually be, or actually is being, constructed. For an analogy, consider the background context of casino licensing set forth in *Kopecky v. Iowa Racing & Gaming Comm'n*, 891 N.W.2d 439, 441 (Iowa 2017). There, "an organization in Linn County applied" for a license to build a new casino it had designed and proposed, but "the Commission denied the organization's application." *Id.* That meant that despite significant planning—and even renderings of where the casino would be located, what it might look like, and what amenities it might include—the proposed project never got off the ground. Similarly, in this case, a map illustrating potential congestion and proposing solutions to relieve the congestion is not imminent until one of those proposals actually comes to life. Plaintiffs even say it themselves: "No project subject to [the ROFR] has yet been approved in Iowa." (Mtn. to Reconsider Br. at 11.) The Court should deny Plaintiffs' request to reconsider or amend its conclusion on standing.

10. Furthermore, even if the Court concludes the events are properly before it, then another passage-of-time event also deserves mention. Although Plaintiffs and Defendants hotly debated whether the Iowa Code had been "codified" before Plaintiffs filed their petition, it has unquestionably been both codified *and* the official version published by now. That does not mean, of course, that Plaintiffs' entire lawsuit has become moot. But it *does* mean that Defendants Glen Dickinson and Leslie Hickey should be dismissed from the case. Those personnel of the Legislative Services Agency (LSA) were likely included as Defendants because LSA is responsible for codifying and publishing the Iowa Code, and as to those Defendants, Plaintiffs sought "an injunction to cease and desist in publication." (Plaintiffs' Resistance to Mtn. to Dismiss at 35.) But now that the Court declined to issue an injunction and the Code has actually been

codified and published, that request for relief is moot and the Court cannot grant Plaintiffs any relief specifically from Dickinson and Hickey. Indeed, Plaintiffs do not seek any other relief from them; Plaintiffs seek an injunction against *enforcement* of the ROFR statute, but Dickinson and Hickey have nothing to do with enforcing the Code. They should be dismissed as Defendants. Dismissing them will not, in the State's view, affect Plaintiffs' ongoing request to enjoin enforcement by the State, the Iowa Utilities Board, and the Board chair.

11. Finally, and most importantly, even if the Court expands its ruling to address the public-importance exception, this case does not qualify, and the Court should not waive standing. While the "doctrine of standing . . . is not so rigid that an exception to the injury requirement could not be recognized for citizens who seek to resolve certain questions of great public importance and interest in our system of government," *Godfrey v. State*, 752 N.W.2d 413, 425 (Iowa 2008), no Iowa appellate court has waived standing in a single-subject clause or title clause case—indicating that the single-subject clause and title clause are not questions of great public importance. *See George v. Schultz*, No. 11–0691, 2011 WL 6077561, at *2 (Iowa Ct. App. Dec. 7, 2011) (noting that although the Iowa Supreme Court "has recognized the possibility of a 'great public importance' exception to standing in Iowa, it has never found an issue of sufficient public import to apply the exception"); *see also Rush v. Reynolds*, No. 19–1109, 2020 WL 825953, at *14 (Iowa Ct. App. Feb. 19, 2020) (concluding a case raising single-subject and title claims was "not the case in which we should first find an issue of such great public importance as to waive traditional standing requirements"). The exception to standing is and should be narrow, and the Court should be especially reluctant to invoke it. *See Sears v. Hull*, 961 P.2d 1013, 1019 (Ariz. 1998) ("The paucity of cases in which we have waived the standing requirement demonstrates both our reluctance to do so and the narrowness of this exception.").

12. Plaintiffs read too much into the notion that *Godfrey* involved only a single-subject claim without an accompanying title claim. (Mtn. to Reconsider Br. at 7.) *See Godfrey*, 752 N.W.2d at 427 ("Importantly, Godfrey does not challenge the title requirement of article III, section 29."). *Rush* rejected a similar argument that simply appending a title claim automatically unlocks a public-importance waiver of standing. *Rush*, 2020 WL 825953, at *10 ("*Godfrey* does not say the plaintiff would have succeeded in obtaining a waiver of standing if she had simply pled the case differently.").[1] Although unpublished, *Rush* is binding on this Court.

13. Further, *Godfrey* cautioned that the Iowa Supreme Court is "especially hesitant to act when asked to resolve disputes that require [it] to decide whether an act taken by one of the other branches of government was unconstitutional." *Godfrey*, 752 N.W.2d at 427. That measured hesitance meant that a claim under article III, section 29 was "not important enough to require judicial intervention into the internal affairs of the legislative branch." *Id.* at 428. And too frequently proceeding with cases under the public-importance exception would risk the Court "assuming 'a position of authority' over the acts of another branch of government." *Id.* at 425 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 574, 112 S. Ct. 2130, 2143 (1992)). The same principle applies here. When plaintiffs lack standing, the Court must carefully "consider whether to avoid becoming embroiled in a case by exercising a waiver of standing requirements to reach an issue that might be better left to the political environment." *Rush*, 2020 WL 825953, at *13.

[1] On the issue of an appended title claim, two dissenting justices in *Godfrey* criticized the majority for "holding that the title clause . . . trumps the single-subject clause," thereby creating a dichotomy that the dissenting justices viewed as "neither principled nor workable." *Godfrey*, 752 N.W.2d at 429 (Wiggins, J., dissenting). However, the principled and workable answer to that purported quandary is easy: rather than waiving standing based on whether a plaintiff raises both types of challenges under article III, section 29, the Court should simply require standing for both types of claims.

14. Additionally, Plaintiffs are incorrect that the underlying subject matter of ROFRs—as distinct from the *legal claims* under the Iowa Constitution—can constitute an issue of great public importance. (Mtn. to Reconsider Br. at 8–9.) When considering whether to waive standing, the proper inquiry is not the underlying policy or its effect on our system or structure of government, but the rarity of the contested *legal* issue. *Godfrey* discussed the inquiry in terms of the legal issue raised (article III, section 29), not the underlying policy (availability of workers' compensation benefits for successive injuries). *See Godfrey*, 752 N.W.2d at 417, 427–28. And it ultimately decided "the *constitutional* issue presented" did not justify waiving standing. *Id.* at 428 (emphasis added). Thus, the policy arguments for and against ROFRs (Mtn. to Reconsider Br. at 8–10) are irrelevant.[2]

15. Here, the legal issues are neither rare nor extraordinary. Cases challenging statutes under article III, section 29 of the Iowa Constitution have arisen throughout Iowa's history. In the first hundred years after the 1857 Constitution, "about ninety cases [came] before the Iowa Supreme Court in which the validity of a statutory provision [was] assailed for noncompliance"

[2] Nonetheless, Plaintiffs' statement that the Iowa Attorney General's Office "changed its position" (Mtn. to Reconsider Br. at 9), or the implication that the attorney general's office contradicts itself by representing the Defendants in this case, is misguided. Plaintiffs ignore two important aspects about the attorney general's office. First, the Office of Consumer Advocate (OCA), which filed the brief upon which Plaintiffs rely, is "a separate division of the department of justice" and is located "at the same location as" the Iowa Utilities Board—not in the same location or the same division as the attorneys who routinely represent State agencies and officials in litigation. Iowa Code § 475A.3(1). Second, Plaintiffs elide the distinction (whether intentionally or not) between OCA's advocacy for *consumers*, and the attorney general's statutory duty to defend State laws and officials. *Compare id.* § 475A.2, *with id.* § 13.2(1)(*b*)–(*c*) (requiring the attorney general to "defend . . . all actions and proceedings" when "the state may be a party," as well as to "defend all actions and proceedings brought by or against any state officer in the officer's official capacity"). Further, Plaintiffs also conflate OCA's *policy* stance about whether ROFRs are a good idea with the different legal question whether the legislature's decision to enact one was constitutionally valid. *See Exira Cmty. Sch. Dist. v. State*, 512 N.W.2d 787, 795 (Iowa 1994) ("It is not for us to judge the wisdom of such a policy. That was a legislative call.").

with article III, section 29—an average of just under one per year. William Yost, Note, *Before a Bill Becomes a Law—Constitutional Form*, 8 Drake L. Rev. 66, 67 (1958). Since then, litigants have continued to raise challenges under article III, section 29 periodically. The presence of multiple lawsuits raising claims under article III, section 29 in the past few years—two of which were decided by the court of appeals in 2020—demonstrates that the issue continues to arise and does not need a waiver of standing so that an oft-forgotten subject finally gets some airtime.

16. *George v. Schultz* also directly defeats Plaintiffs' assertion that a single-subject claim is of the utmost importance (for waiver-of-standing purposes) simply because of its constitutional dimension. (Mtn. to Reconsider Br. at 6–8.) *See George*, 2011 WL 6077561, at *3. The plaintiffs in *George* asserted that government action occurred in violation of the constitution: specifically, the requirement in article V, section 17 of the Iowa Constitution that judges standing for retention appear "on a separate ballot." Like Plaintiffs here, the plaintiffs in *George* argued "the words of the constitution are mandatory, but the constitution does not protect itself, so they should be allowed to." *Id.* at *2. However, even though the "separate ballot" language of article V, section 17 had been rarely (if ever) litigated, and even though declining to apply the exception meant that some justices would be unable to serve after their term ended, the court of appeals declined to apply the exception. *See id.* at *3. It concluded the exception is properly deployed only when declining to apply it would result in a constitutional crisis. *See id.*

17. Declining to apply the exception here after finding Plaintiffs otherwise lack standing would not result in a constitutional crisis. It would leave open a challenge to the ROFR statute on equal protection grounds if Plaintiffs eventually demonstrate standing; and it would leave open any future single-subject challenge to any future piece of legislation—regardless of its "effective date" versus the codification date (Mtn. to Reconsider Br. at 11)—by a person with

proper standing to raise it. The potential loss of a claim under article III, section 29 may occur, but is not a reason to waive standing; rather, it is "an inescapable conclusion" of the codification window itself. *State v. Kolbet*, 638 N.W.2d 653, 661 (Iowa 2001).

18. Finally, Plaintiffs' assertion that if they do not have standing, no party does (Mtn. to Reconsider Br. at 11) is a red herring. As the United States Supreme Court has explained, the assumption that if a specific set of challengers "have no standing to sue, no one has standing, is not a reason to find standing." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227, 94 S. Ct. 2925, 2935 (1974).

WHEREFORE, Defendants respectfully request that the Court deny Plaintiffs' motion. If the Court grants the motion for the limited purpose of addressing the public-importance exception, the Court should (1) decline to reconsider or change its conclusion that Plaintiffs lack standing; and (2) find the exception does not apply. Defendants also request any other relief the Court deems appropriate under the circumstances.

Respectfully submitted,

THOMAS J. MILLER
IOWA ATTORNEY GENERAL

/s/ *David M. Ranscht*
DAVID M. RANSCHT

/s/ Benjamin Flickinger
BENJAMIN FLICKINGER
Assistant Attorneys General
1305 East Walnut St., 2nd Floor
Des Moines, Iowa 50319
Ph: (515) 281-7175
Ph: (515) 725-0501
Email: David.Ranscht@ag.iowa.gov
Email: Ben.Flickinger@ag.iowa.gov
ATTORNEYS FOR DEFENDANTS

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